SUBJECT INDEX

Page

Petitioner's Reasons for Allowance of Writ 1

Statement of the Case 2

Argument 11

1. Respondent Is Entitled to Recover from Defendants Macri and Petitioner in Quantum Meruit, Either the Reasonable Value of All of the Labor and Materials Furnished by Respondent to Defendants Macri, Less What Respondent Has Already Been Paid, or the Reasonable Value of the Extra Labor and Materials Furnished by Respondent Plus the Sum Remaining Unpaid on the Contract 12

   A. Respondent is entitled to recover from defendants Macri and petitioner in quantum meruit, the reasonable value of the labor and materials furnished by him less the amount he has received, due to the willful breaches of the subcontract by the Macris 13

   B. Respondent is entitled to recover from the Macris the amount of his claim, for the reason that an injustice can be avoided only by enforcement of the Macris' promises to pay respondent's costs and expenses, and the Macris are estopped to assert that their promises are not binding upon them, such recovery being in quantum meruit 19

   C. Respondent is entitled to recover from the Macris the reasonable value of the extra labor and materials furnished by him, on the basis of an implied-in-fact agreement to pay for them 23

SUBJECT INDEX (Cont.)

Page

Cases cited by petitioner in support of reason No. 1 for the allowance of the writ 27

Cases cited by petitioner in support of reason No. 3 for the allowance of the writ 29

2. Respondent Is Entitled to Recover from the Defendants Macri and Petitioner the Amount of His Claim Under the Miller Act 30

Cases cited by petitioner in support of reason No. 1 for the allowance of the writ 40

Decisions of this court which have settled questions of federal law involved in the present case 44

Cases cited by petitioner in support of reason No. 3 for the allowance of the writ 45

3. Respondent Is Entitled to Recover All Items Allowed by the District Court 45

Cases cited by petitioner in support of reason No. 1 for the allowance of the writ 48

4. The Law Governing the Several Issues 50

5. The Evidence Establishes With Reasonable Certainty the Amount Which Respondent Is Entitled to Recover 50

A. Recovery in quantum meruit of all respondent's costs and expenses, together with overhead and profit, based upon the Macris' willful and continuing breaches of the subcontract 51

B. Recovery based on the principle that an injustice can be avoided only by enforcement of the Macris' promises to pay re-

SUBJECT INDEX (Cont.)

Page

spondent's costs, and the Macris are estopped to assert that their promises are not binding upon them 53

C. Recovery based on the implied-in-fact agreement of the Macris to pay respondent's costs 63

Cases cited by petitioner in support of reasons No. 1 and 3 for the allowance of the writ 63

TABLE OF CASES

Page

Alameda County Title Insurance Co. v. Panella, 218 Cal. 510, 24 P. 2d 163 21
Albachten v. Bradley, 212 Minn. 359, 3 N.W. 2d 783 21
American Surety Co. v. Wheeling, 114 Fed. 2d 237 (C.C.A. 4) 44
Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 90 L. Ed. 1515, 66 S. Ct. 1187 62
Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 90 L. Ed. 652, 66 S. Ct. 574 62
Bishop v. Ryan Construction Co., 106 Wash. 254, 180 P. 126 14
Brogan v. National Surety Co., 246 U.S. 257, 62 L. Ed. 703, 38 S. Ct. 250 45
Callan v. Andrews, 48 Fed. 2d 118 (C.C.A. 2) 25
City & County of San Francisco v. Transbay Construction Co., 134 Fed. 2d 468 (C.C.A. 9), Cert. Den. 320 U.S. 749, 88 L. Ed. 445, 64 S. Ct. 52 27
Collins v. Lewis, 111 Conn. 299, 149 Atl. 668 25
Continental Casualty Co. v. Clarence L. Boyd Co., 140 Fed. 2d 115 (C.C.A. 10) 49

TABLE OF CASES (Cont.)

Page

Continental Casualty Co. v. United States, 173 Fed. 2d 5 (C.C.A. 9) 4, 7, 9, 12, 35, 50, 53
Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762 28
Dow v. United States, 154 Fed. 2d 707 (C.C.A. 10) 32, 36
Farnum v. Kennebec Water Dist., 170 Fed. 173 (C.C.A. 1) 27
Fried v. Fisher, 328 Pa. 497, 196 Atl. 39 21
Glassell-Taylor Co. v. Magnolia Petroleum Co., 153 Fed. 2d 527 (C.C.A. 5) 46
Golwitzer v. Hummel, 201 Ia. 751, 206 N.W. 254 15
Great Lakes Construction Co. v. Republic Creosoting Co., 139 Fed. 2d 456 (C.C.A. 8) 13, 31, 34
Hooper v. O. M. Corwin Co., 199 Wis. 139, 225 N.W. 822 25
Klebe v. United States, 263 U.S. 188, 68 L. Ed. 244, 44 S. Ct. 58 29
Lange v. United States, 120 Fed. 2d 886 (C.C.A. 4) 31
L. P. Friestedt Co. v. U. S. Fireproofing Co., 125 Fed. 2d 1010 (C.C.A. 10) 40, 41, 43
Luther v. National Bank of Commerce, 2 Wash. 2d 470, 98 P. 2d 667 21
Maryland Casualty Co. v. City of Tacoma, 199 Wash. 72, 90 P. 2d 226 13
McDonald v. Supple, 96 Or. 486, 190 P. 315 13
McEvoy v. United States, 322 U.S. 102, 88 L. Ed. 1163, 64 S. Ct. 890 ..... 44, 45
Nelson v. City of Seattle, 180 Wash. 1, 38 P. 2d 1034 ..... 13, 17, 21, 35, 48
Patrick v. Bonthius, 13 Wash. 2d 210, 124 P. 2d 550 15
Roberts v. Gerlinger, 124 Or. 461, 263 P. 916 25
Ross Engineering Co. v. Pace, 153 Fed. 2d 35 (C.C.A. 4) 29, 32, 36
Royal Indemnity Co. v. Woodbury Granite Co., 101 Fed. 2d 689 (Ct. App. D.C.) 31
Schuehle v. City of Seattle, 199 Wash. 675, 92 P. 2d 1109 13

TABLE OF CASES (Cont.)

Page

Schwasnick v. Blandin, 65 Fed. 2d 354 (C.C.A. 2) 14, 17, 35, 48
Sofarelli Bros. v. Elgin, 129 Fed. 2d 785 (C.C.A. 4) 14, 17, 35, 47
Theobald-Jansen Electric Co. v. P. H. Meyer Co., 77 Fed. 2d 27 (C.C.A. 10) 48
Turner v. Henning, 262 Fed. 637 (Ct. App. D.C.) 15
Typhoon Air Conditioning Co., Inc. v. Fried, 147 Pa. Super. 605, 24 Atl 2d 926 15
United States v. Ambursen Dam Co., 3 Fed. Sup. 548 (D. Ct. Cal.) 46
United States v. American Surety Co., 200 U.S. 197, 50 L. Ed. 437, 26 S. Ct. 168 ..... 33, 39, 44
United States v. Davidson, 71 Fed. Sup. 401 (D. Ct. Ida.) 48
United States v. Great American Indemnity Co., 30 Fed. Sup. 613 (D. Ct. N.H.) 48
United States v. John A. Johnson Contracting Corp., 139 Fed. 2d 274, Cert. Den. 321 U.S. 797 (C.C.A. 3) 31, 33, 37, 43
United States v. Maryland Casualty Co., 54 Fed. Sup. 290 (D. Ct. La.), affirmed 147 Fed. 2d 423 (C.C.A. 5) 41, 43
United States v. Massachusetts Bonding and Insurance Co., 18 Fed. 2d 203 (C.C.A. 6) 44
United States v. Mathew Cummings Co., 27 Fed. Sup. 405 (D. Ct. Mass.) 32, 36
United States v. Otis Williams & Co., 30 Fed. Sup. 590 (D. Ct. Ida.) 32, 37
United States v. Rego Building Corp., 87 Fed. 2d 1021 (C.C.A. 2) 49
United States v. Seaboard Surety Co., 26 Fed. Sup. 681 (D. Ct. Mont.), affirmed 106 Fed. 2d 355 (C.C.A. 9) 42, 43, 46
United States v. Standard Accident Ins. Co., 106 Fed. 2d 200 (C.C.A. 7) 31, 32, 37
United States v. Standard Casualty Co., 32 Fed. Sup. 836 (D. Ct. N.Y.) 49

TABLE OF CASES (Cont.)

Page

United States v. Wyckoff Pipe & Creosoting Co., 271 U.S. 263, 70 L. Ed. 938, 46 S. Ct. 503 ..... 29, 63
United States v. Zara Contracting Co., 146 Fed. 2d 606 (C.C.A. 2) 13, 17, 30, 34, 45, 47
U. S. Potash Co. v. McNutt, 70 Fed. 2d 126 (C.C.A. 10) 27, 28
Vaught v. Charleston National Bank, 62 Fed. 2d 817 (C.C.A. 10) 25
Western Asphalt Co. v. Valle, 25 Wash. 2d 428, 171 P. 2d 159 24
Wolfe v. Prairie Oil & Gas Co., 83 Fed. 2d 434 (C.C.A. 10) 27

UNITED STATES CODE

Title 40, U.S.C.A., Section 270b 33

TEXTBOOKS

Restatement of Law of Contracts, Section 72 24
Restatement of Law of Contracts, Section 90 21
Restatement of Law of Contracts, Section 317 22
Restatement of Law of Contracts, Section 347 ..... 16, 22, 35, 47
Restatement of Law of Contracts, Section 357 ..... 15, 16
1 Williston on Contracts, Section 36 24
1 Williston on Contracts, Section 36A 24
1 Williston on Contracts, Section 91 24
1 Williston on Contracts, Section 91A 24
1 Williston on Contracts, Section 139 21
3 Williston on Contracts, Section 679 21
3 Williston on Contracts, Section 689 21
3 Williston on Contracts, Section 805 15
3 Williston on Contracts, Section 842 15
5 Williston on Contracts, Section 1480 ..... 17, 35, 47

In the Supreme Court
of the United States

OCTOBER TERM, 1948

No.....

CONTINENTAL CASUALTY COMPANY, a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA, for the use of M. C. SCHAEFER, an individual doing business as CONCRETE CONSTRUCTION COMPANY,

Respondent,

SAM MACRI, DON MACRI, and JOE MACRI, individuals and co-partners; A. J. GOERIG and CLYDE PHILP, individuals and co-partners,

Defendants.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

PETITIONER'S REASONS FOR ALLOWANCE OF WRIT

Respondent asserts that the reasons assigned by petitioner for allowance of a writ of certiorari (Petition

13, 14) are without adequate foundation. These reasons will be considered separately:

1. The decision of the Court of Appeals is in conflict with the decisions of Courts of Appeals of other Circuits on the same matter.

The Court is referred to pages 27, 40, 48, 63 of this brief for a discussion of this reason assigned by petitioner for the allowance of the writ.

2. The Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this court.

The decision of the Court of Appeals is supported by decisions of this court which are cited on page 44 of this brief.

3. The Court of Appeals has decided important questions of federal law in a way probably in conflict with applicable decisions of this court.

The court is referred to the discussion of the cases cited by the petitioner on pages 29, 45, 63 of this brief.

STATEMENT OF THE CASE

The District Court entered judgment against the defendants Macri and petitioner, their surety. On the appeals of all of such defendants, the judgment was affirmed.

Throughout the petition and supporting brief, including the questions presented and argument, petitioner

has persistently failed to mention or consider certain facts which were found to exist by the District Court and the Court of Appeals, and which are as prominent in this case as the view of a mountain from a plain.

We refer particularly to promises made by Mr. Sam Macri to respondent with respect to compensation to be paid to respondent for labor and materials furnished by him, in addition to the amounts which would ordinarily be required in the performance of the subcontract. These promises are stated hereafter in the statement of the case.

By the terms of the subcontract entered into between defendants Macri and respondent, the latter agreed to furnish all labor and necessary equipment to do all of the concrete work, including the erection of the wooden forms and the installation of reinforcing steel. It was also agreed in the subcontract that all of the excavating and all of the materials necessary for the performance of the subcontract by respondent, were to be furnished by defendants Macri, with the exception of the form wire, nails, and curing material. It was further agreed therein that the excavating was to be done, and the materials were to be supplied by defendants Macri, in accordance with the plans and specifications and in proper time for performance of the subcontract by respondent (R. 99, 100). The excavation required of defendants Macri by this instrument included what is called fine grading, which consisted in hand grading to specific dimensions after a shovel had removed earth to within 3 to 5 inches of such dimensions.

Both the District Court and the Court of Appeals found that from the time respondent commenced to perform the subcontract until his work was completed, defendants Macri were guilty of breaches of their obligations under the subcontract in certain respects which are well stated in the opinion of the Court of Appeals in these words (173 Fed. 2d 5, 7):

> "The court further found that Schaefer's performance was diligent, but that the Macris had breached the subcontract in that they failed to make the excavations in the proper manner so that Schaefer's carpenters had to make extra excavations in order to install the forms. The Macris also failed to do the fine grading in the proper manner and in time for Schaefer to proceed with prompt progress of the work. The Macris also failed to furnish the proper quality and quantity of lumber required, which hindered and delayed Schaefer in the performance of his work. Macris' breaches were found willful and negligent and they continued and persisted throughout the entire performance of the subcontract."

It will be observed in the last sentence of that quotation that both courts found that these breaches of defendants Macri were willful and negligent and continued throughout the performance of the subcontract by respondent.

Petitioner mentions the fact that respondent and his men complained to defendants Macri on many occasions that the latter were not performing their obligations under the subcontract. Some of such complaints led to two meetings at the project between the defendant Sam Macri and respondent. Petitioner declares that Mr.

Macri then told Mr. Schaefer that defendants Macri would thereafter do better, but petitioner completely disregards the testimony and the findings of both courts with respect to the remainder of the conversations between these men on the two occasions mentioned.

At the first meeting, on April 29, 1944, approximately six weeks after the subcontract was executed, the two men went into the field and examined a number of excavations. All proved to be defective. Mr. Macri then asked Mr. Schaefer to do the fine grading, saying that he would pay for it, but Mr. Schaefer refused to undertake the work and asked Mr. Macri to have sufficient men there so he wouldn't be delayed, that the excavations be done according to specifications, and that ample lumber be supplied in time in order that respondent's men could pour not less than 20 yards of concrete per day. Mr. Schaefer reminded him of a previous promise to so perform his obligations that the respondent would be off the job by September 15th. Mr. Macri replied, "You'll be out of here by September 15th, there isn't gonna be anybody lose any money on our job; we'll get this thing straightened out and get going. * * * I'll pay you for the expense of excavating that you do here (R. 221 to 224)." Mr. Schaefer's reply was, "Who's going to pay for the extra expense of building panels in the way that we're now required to build panels, or setting these panels in holes like this, * * * instead of to specification, of stripping the forms out of these holes, doing the necessary excavating to get them out, wrecking them, having to haul them all back to the yard for

repair, instead of to structures ahead?" Mr. Macri said, "I'll pay you for all the extras, just get going." Mr. Schaefer replied, "You're going to pay for all additional cost and expense." Mr. Macri then said, "I told you that before." Mr. Schaefer then added, * * * "You're going to have the necessary men and equipment in here, and you're going to get going with the excavating so we can pour the minimum of twenty or twenty-five yards per day (R. 225 to 227)." Mr. Macri then said, "Well, that's it, that's all right (R. 227)."

Respondent returned to the project on May 19th and found no work going on and no lumber. The side walls still required additional digging to accommodate the forms and there were no excavations ready for forms. Respondent then instructed his superintendent to take all of his men back to Portland with the exception of two (R. 279, 280, 282).

Mr. Schaefer met Mr. Macri again on June 15th, on the project. There was still nothing being done. The shovel was broken down and was in the yard. The Macris did not have a hand-excavating crew on the job. In fact, there was no one on the job (R. 284, 285, 286). At that time enough forms had been prepared by respondent to permit the assembly of about 72 to 75 structures, the term used to designate the forms when ready to receive concrete. There were no excavations ready for the placing of the structures, however, and, in fact, none was ready to receive forms until June 29th.

At the meeting of June 15th another conversation was held between Mr. Macri and Mr. Schaefer which

was substantially similar to that of April 29th. After discussing the general situation, Mr. Schaefer said to Mr. Macri, "We won't be through with this job by September 15th." Mr. Macri replied, "Nobody's lost any money on my job. We'll be out by September 15th. This little excavating, you go ahead and do it. We'll pay for it." Mr. Schaefer then said, "That isn't all you're going to pay for. You're going to pay all the costs, all expenses, all the extras." Mr. Macri replied, "Well, I told you that before; quit arguing. * * * You're not going to have to wait for anything any more. You just get back here and get going (R. 286, 287)."

The District Court found that these conversations occurred. While the Court of Appeals did not expressly approve such findings, it clearly adopted them by implication. The latter court said in its opinion (173 Fed. 2d 5, 7,8):

> "The court further found that Schaefer had made many complaints to the Macris regarding the latter's defaults; that the Macris induced Schaefer to continue performance and to perform some of the work the Macris were to do, and that Schaefer would be compensated for the additional expense because of the adverse conditions created by the Macris. The court found that 'there was an implied agreement or quasi-contract that * * * Schaefer was to be paid the fair and reasonable value of his subcontract under the conditions and with the extra burdens imposed upon (Schaefer by the Macris' breaches).' "
>
> * * * * *
>
> "The district court held that there was an 'implied agreement or quasi-contract' to the effect that the Macris would pay Schaefer the fair and reason-

able value of his subcontract under the conditions and with the extra burdens imposed upon Schaefer by the Macris' breach and failure to perform their part of the subcontract. The Macris claim there is no substantial evidence to support the finding that they breached the subcontract. While the testimony is conflicting, the record contains sufficient evidence to support the finding, and this court will not weigh the evidence in such a case. Federal Rules of Civil Procedure, rule 52 (a), 28 U.S.C.A. We cannot say that this finding is clearly erroneous.

"Since the court found that the subcontract was willfully breached by the Macris and that they induced Schaefer to continue performance and even to perform part of the Macris' work, Schaefer should be allowed to recover in excess of the stipulated contract price for the extra work performed in reliance on the Macris' statements, which were intended to induce reliance."

In spite of diligent effort on his part, respondent was not able to complete the performance of the subcontract until April 1945 because of the willful and negligent failure of defendants Macri to perform the obligations imposed on them by the subcontract. Exhibit 51 (R. 572, 578, 586), which is considered in some detail in contention No. 5 in this brief, and the testimony of two witnesses, one of whom was wholly disinterested, indicate clearly that respondent could have fully performed the subcontract in from 3½ to 4 months under normal conditions (R. 464, 572, 586, 1160-1162).

Petitioner insists that respondent has been seeking the recovery of damages for breach of contract. It is clear, however, that the only count in the amended complaint on which the District Court permitted a re-

covery is the one based on quantum meruit. The opinion of the Court of Appeals indicates beyond doubt that both courts regarded the judgment as based on the reasonable value of the labor and materials furnished by respondent plus overhead and profit, and not upon damages for breach of contract. This is plain in view of the language already quoted from the opinion and the following (173 Fed. 2d 5,8):

> "Whether the theory is called implied-in-fact contract, quasi-contract, or promissory estoppel, the measure of Schaefer's recovery against the Macris should be the reasonable value of the work and materials furnished plus overhead and profit."

The Court of Appeals did not base its decision on "an alleged express oral agreement of Macri to pay extra costs," as contended by petitioner (Petition 9). This is evident from the last quotation, and the last sentence of the one previously set forth.

It is true that the District Court found that there was no express contract, or meeting of the minds, that respondent was to do what fine grading was required by the defective conditions of the excavations. Respondent stated more than once that he did not wish to assume the obligation of fine grading the excavations; consequently, there was no express contract that he would do that work. He did perform much of it, however, at the request of the defendants Macri and with their knowledge, because he had to do it to get his own work done. As a result, an implied-in-fact contract that the defendants Macri would pay for such work could and did arise, and the mere fact that respondent declined

to promise to perform it did not prevent the creation of an implied-in-fact agreement when he did perform part of it under necessity.

Petitioner declares: "It is undisputed that Schaefer never assumed or agreed to any additional contractual obligations except the original subcontract (Petition 11)." It is true that respondent did not promise to perform any obligations other than those set forth in the subcontract, but it is equally true that he did a tremendous amount of work which he was not obligated to do by the subcontract under such circumstances as to give rise to an implied-in-fact promise by defendants Macri to pay for it. He was compelled to do the extra work in order that he might perform his own obligations under the subcontract. Defendants Macri stood by and watched him do it, accepted such work without protest, and in fact urged him to go ahead and do it. Defendants Macri received full benefit from the extra work done by respondent by being paid by the United States Government.

It is acknowledged that respondent did not keep records from which the exact amount of the extra work could be determined, the reason for such failure being that it was physically impossible in most instances for him to do so. There is ample testimony in the record, however, to permit a determination with reasonable certainty of the reasonable value of the extra labor and materials furnished by respondent. Both the District Court and the Court of Appeals concluded that the amount of respondent's increased costs was established

with reasonable certainty. In view of the fact that petitioner still contends that there was insufficient proof insofar as the amount of recovery was concerned, this question will be more fully considered in the argument of contention No. 5 in this brief.

ARGUMENT

Summary of Argument

Petitioner's contention No. 4 concerns the right of respondent to recover in quantum meruit under the law of contracts. It is therefore considered first in respondent's brief. The other contentions of petitioner are discussed in order, in this brief, with the exception of No. 6, which does not affect respondent in any way.

1. Respondent is entitled to recover from defendants Macri and petitioner in quantum meruit, either the reasonable value of all of the labor and materials furnished by respondent to defendants Macri, less what respondent has already been paid, or the reasonable value of the extra labor and materials furnished by respondent.

2. Respondent is entitled to recover from defendants Macri and petitioner the amount of his claim under the Miller Act.

3. Respondent is entitled to recover all items allowed by the District Court.

4. The law governing the several issues.

5. The evidence establishes with reasonable certainty the amount which respondent is entitled to recover.

1.

RESPONDENT IS ENTITLED TO RECOVER FROM DEFENDANTS MACRI AND PETITIONER IN QUANTUM MERUIT, EITHER THE REASONABLE VALUE OF ALL OF THE LABOR AND MATERIALS FURNISHED BY RESPONDENT TO DEFENDANTS MACRI, LESS WHAT RESPONDENT HAS ALREADY BEEN PAID, OR THE REASONABLE VALUE OF THE EXTRA LABOR AND MATERIALS FURNISHED BY RESPONDENT PLUS THE SUM REMAINING UNPAID ON THE CONTRACT

As indicated in the opinion of the Court of Appeals, there are three separate legal theories which fully sustain the right of respondent to recover in quantum meruit. It will be recalled that the court said (173 Fed. 2d 5, 8):

> "Whether the theory is called implied-in-fact contract, quasi-contract, or promissory estoppel, the measure of Schaefer's recovery against the Macris should be the reasonable value of the work and materials furnished plus overhead and profit."

Each of these three theories will be briefly stated herein, with the authorities upon which it is based. Respondent contends that each of these, standing alone, is sufficient to warrant the affirmance of the judgment in this case. Petitioner's contention No. 4, however, relates to only the first of such theories. It will be briefly answered, but it cannot in any event have any effect upon the principles set forth in the discussion of the second and third of the theories relied upon by respondent.

A.

Respondent is entitled to recover from defendants Macri and petitioner in quantum meruit, the reasonable value of the labor and materials furnished by him less the amount he has received, due to the willful breaches of the subcontract by the Macris.

The basis of this contention is that the District Court and the Court of Appeals found the following facts: (1) the Macris were guilty of willful and negligent, material breaches of the subcontract through the performance of the work by respondent, in the respects mentioned in the statement of the case. (2) Respondent furnished labor and materials and performed services for the Macris at their request of the reasonable cost and value stated in the findings of fact of the District Court (R. 103, 104).

It is established beyond any doubt that where one of the parties to a contract is guilty of a material breach, the injured party may recover the reasonable value of the labor and materials which he furnished to the other party, in quantum meruit.

United States v. Zara Contracting Co., 146 Fed. 2d 606 (C.C.A. 2).
Great Lakes Construction Co. v. Republic Creosoting Co., 139 Fed. 2d 456 (C.C.A. 8).
McDonald v. Supple, 96 Or. 486, 190 P. 315.
Nelson v. City of Seattle, 180 Wash. 1, 38 P. 2d 1034.
Maryland Casualty Co. v. City of Tacoma, 199 Wash. 72, 90 P. 2d 226.
Schuehle v. City of Seattle, 199 Wash. 675, 92 P. 2d 1109.

Bishop v. Ryan Construction Co., 106 Wash. 254, 180 P. 126.
Sofarelli Bros. v. Elgin, 129 Fed. 2d 785 (C.C.A. 4).
Schwasnick v. Blandin, 65 Fed. 2d 354 (C.C.A. 2).

It is respectfully contended on behalf of respondent that these decisions govern this situation.

It is asserted by petitioner in its contention No. 4 that there can be no recovery in quantum meruit in this case for these reasons: (1) Assuming that the Macris were guilty of continuing total breaches of the subcontract, respondent elected to continue his performance and thereby waived his right to regard the breaches as total, and rendered them partial breaches of contract. (2) There can be no recovery in quasi contract following the waiver of such total breaches, and the only remedy available to respondent for the partial breaches of contract is a recovery of damages against the Macris measured by the increased cost of respondent's performance due to such partial breaches of the contract.

Respondent contends that the principle relied upon by the petitioner should not be applied in this case for the reason that the breaches of contract by the Macris were willful.

It is an established principle of contract law, having particular application to construction contracts, that a builder is entitled to recover the contract price even though there are some defects or omissions in his performance, if it can be said that he has substantially performed the contract. The owner is then entitled to

sufficient compensation from the builder to permit the defects to be corrected or the omissions to be supplied.

> 3 Williston on Contracts, Sections 805 and 842.
> *Patrick v. Bonthius,* 13 Wash. 2d 210, 124 P. 2d 550.

There is an exceedingly important limitation upon this principle, however. It is said by the text writers and it has been repeatedly held by the courts that the principle does not apply if the builder willfully fails or refuses to perform the contract in accordance with the plans and specifications.

> 3 Williston on Contracts, Section 805.
> *Golwitzer v. Hummel,* 201 Ia. 751, 206 N.W. 254.
> *Typhoon Air Conditioning Co., Inc. v. Fried,* 147 Pa. Super. 605, 24 Atl. 926.
> *Turner v. Henning,* 262 Fed. 637 (Ct. App. D. C.).
> See also *Patrick v. Bonthius,* supra.
> Restatement of the Law of Contracts, Section 357.

The significance of these principles relating to the effect of a willful breach of contract, may be briefly stated:

By reason of their willful breaches of contract, the Macris would not have been entitled to rely upon the doctrine of substantial performance if respondent had not fully performed, and could not, therefore, have secured full performance from respondent in accordance with the terms of the contract, and limited his recovery to damages in an amount sufficient to correct the defects or supply the omissions in the Macris' performance.

That being so, the Macris' only remedy for a failure of performance by respondent would have been an action based upon Section 357 of the Restatement, and their recovery would have been the net benefit conferred by the Macris upon respondent. But the net benefit to respondent was a minus quantity and the principles of quasi contract which give a remedy when necessary to avoid an unjust enrichment, declare that respondent should recover in quantum meruit from the Macris the difference between the benefits conferred by each of these parties upon the other.

Assuming, therefore, that respondent is entitled to recover in quantum meruit, such recovery is not limited to his actual cash expenditures for labor and materials, but he may recover, in addition, reasonable overhead and profit. In other words, respondent is entitled to recover the amount the Macris would have been compelled to pay in the open market for the labor and materials which were actually furnished by him. This is established by the following authorities:

Comment c following Section 347 of the Restatement, states:

> "If the plaintiff's performance is part of the very performance for which the defendant bargained as part of an agreed exchange, it is to be valued, not by the extent to which the defendant's total wealth has been increased thereby, but by the amount for which such services and materials as constituted the part performance could have been purchased from one in the plaintiff's position at the time they were rendered."

There is an excellent discussion of this subject in 5 Williston on Contracts, Section 1480.

This measure of recovery was approved in the following cases:

United States v. Zara Contracting Co., 146 Fed. 2d 606 (C.C.A. 2). The court held, in the language of the Restatement, that the plaintiff's performance was to be valued by the amount the services and materials supplied by the plaintiff, "could have been purchased from one in the plaintiff's position" at the time they were supplied. A judgment for the plaintiff was increased and affirmed.

Schwasnick v. Blandin, 65 Fed. 2d 354 (C.C.A. 2). In reliance upon the same section of the Restatement and 5 Williston on Contracts, Section 1480, the court held that the plaintiff could recover the reasonable value of his services, "measured by what he could have got for them in the market, and not by their benefit to the promisor."

Sofarelli Bros. v. Elgin, 129 Fed. 2d 785 (C.C.A. 4). The court here allowed recovery of overhead.

Nelson v. City of Seattle, 180 Wash. 1, 38 P. 2d 1034. The court allowed fifteen per cent for profit, "the going rate on City contracts."

If an injured plaintiff is entitled to recover the market value of the labor and materials furnished by him, it is clear that overhead and profit should be included in the sum awarded him, inasmuch as any one offering to furnish labor and materials in the open market natu-

rally includes overhead and profit in the amount of his offer.

It is respectfully submitted, therefore, that respondent should recover in quantum meruit the amount allowed by the court, including overhead and profit, less what he has received.

Brief comments appear to be warranted with respect to several of the statements appearing in petitioner's contention No. 4.

It is said, page 38, that it is fundamental that where there is an express contract the law will not create an implied or quasi contract. Respondent acknowledges that where there is a single contract which has not been modified or added to by parol or in writing or by the conduct of the parties, it is the general rule that a contract may not be implied in fact contrary to the terms of such original contract. The original contract between the parties in the present case, the subcontract, was clearly modified or added to by the statements and conduct of the parties. The rights of these parties are, therefore, not governed solely by such subcontract, but by such modifications and additions as well as the subcontract. Inasmuch as the modifications and additions were not created by express contract, the principle stated clearly does not prevent the creation of an implied or quasi contract insofar as such modifications and additions are concerned.

None of the authorities cited by petitioner in the argument of its contention No. 4 is applicable to the

present case for the reason that not one purports to cover the situation in which the original contract was modified or added to by parol or the conduct of the parties, as in the present case.

B.

Respondent is entitled to recover from the Macris the amount of his claim, for the reason that an injustice can be avoided only by enforcement of the Macris' promises to pay respondent's costs and expenses, and the Macris are estopped to assert that their promises are not binding upon them, such recovery being in quantum meruit.

This contention is based upon the following established facts: From the beginning, the Macris knew that they were not performing their duties in accordance with the specifications. They knew, furthermore, that respondent was refusing to perform any of Macris' work and that he was actually unable to do his own until the Macris had completed what they were required to do. In this state of affairs, Mr. Sam Macri promised "to do better." He also promised on two occasions to pay the respondent's costs, but it is not entirely clear whether he promised to pay all of respondent's costs and expenses, or the additional costs and expenses made necessary by the Macris' failure to perform their obligations. There is evidence supporting each view, but it is entirely immaterial which is adopted, as the governing rules of law and extent of recovery are the same in each instance. The District Court intimated that he inclined toward the latter (R. 103, 2214, 2215), but he actually decided that respondent should recover all costs and

expenses less what he had already received (R. 103, 104, 112). Hereafter these promises will be stated to be simply, "to pay respondent's costs and expenses."

The Macris should reasonably have expected that the promises to pay respondent's costs would induce respondent to do all of the Macris' work which they left undone, in order that respondent might make certain that he could fully perform all of his own obligations. The Macris knew that respondent himself had executed a performance bond and that he would have been liable to both the Macris and the surety named in such bond in the event of a default on his part. In that event, either the surety or the Macris would have taken over respondent's obligations and performed his contract, with resulting loss of profits and prestige to respondent.

In reliance upon these promises, respondent continued to perform his duties and, in fact, completed everything he was required to do. In so carrying out his own work, respondent performed a considerable portion of the Macris' duties which increased his costs to an amount between two and three times greater than would have been necessary if the Macris had performed according to specifications. The Macris did not "do better," and performance of the prime contract with the government would have been delayed far beyond its actual completion, if respondent had not done a considerable portion of the Macris' work. The Macris, of course, received the full benefit of the labor and materials furnished by respondent.

This theory of respondent is based upon the principle stated in Section 90 of the Restatement of the Law of Contracts in these words:

> *"Promise reasonably inducing definite and substantial action.* A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

1 Williston on Contracts, Section 139.
3 Williston on Contracts, Sections 679 and 689.

That principle was applied in the following decisions:

Albachten v. Bradley, 212 Minn. 359, 3 N.W. 2d 783.
Fried v. Fisher, 328 Pa. 497, 196 Atl. 39.
Luther v. National Bank of Commerce, 2 Wash. 2d 470, 98 P. 2d 667.
Alameda County Title Insurance Co. v. Panella, 218 Cal. 510, 24 P. 2d 163.

In *Nelson v. City of Seattle,* 180 Wash. 1, 38 P. 2d 1034, 1041, the court said, with respect to a promise made without consideration:

> "Nelson (the general contractor) was anxious to have the work progress with as great speed as possible. Hence his proposal to pay half the rental of the additional tug and allow Vigilant (the subcontractor) the use of the scow without charge. Vigilant having acted upon the oral agreement, Nelson could not thereafter withdraw from it."

It is evident that the facts of this case bring it within the operation of the principle stated in Section 90 of the Restatement and the cases cited. The result is that the

promises of the Macris to pay respondent's costs are binding on them, and since they have not performed those promises, respondent is entitled to pursue all appropriate remedies for breach of contract.

The Macris have paid only about one-third of respondent's total costs and expenses shown by Exhibit 63, the audit which formed the basis for the judgment of the District Court (R. 104, 112, 1241, 1252), and, consequently, none of his extra costs and expenses. It is clear, therefore, that their failure to perform their oral promises constitutes a total breach of such promises within the meaning of Section 317 of the Restatement.

That being true, respondent is entitled to a recovery in quantum meruit, by reason of the principle stated in Section 347 of the Restatement, based on the value of the labor and materials furnished by him.

The correct amount of respondent's recovery is demonstrated in the discussion of contention No. 5 in this brief, on the basis of each view of the testimony with respect to the extent of the promises of the Macris. If they promised to pay all of respondent's costs and expenses, the latter should recover the reasonable value of all labor and materials furnished by him, less what he has already received. If the Macris promised to pay his additional costs and expenses, respondent should recover the reasonable value of all additional labor and materials furnished by him, plus the portion of the contract price remaining unpaid. In either event, he is entitled to overhead and profit in amounts proportionate to his recovery, for the reasons previously stated.

C.

Respondent is entitled to recover from the Macris the reasonable value of the extra labor and materials furnished by him, on the basis of an implied-in-fact agreement to pay for them.

This theory is based upon these established facts: From the beginning the Macris knew that they were not performing their obligations under the subcontract according to the specifications and knew that the respondent was doing a considerable portion of the Macris' work. At the meetings of April 29th and June 15th, 1944, Mr. Macri asked Mr. Schaefer to perform a substantial portion of the work required to be done by the Macris, particularly the fine grading. Mr. Schaefer refused to take over the fine grading. Mr. Macri promised, "to do better" after these meetings, but he failed to show any improvement. It was still necessary, therefore, that respondent do a substantial amount of work required by the subcontract to be done by the Macris, if the prime contract was to be finished within a reasonable time. Respondent, accordingly, continued to do the Macris' work and this was fully known to the latter. The Macris accepted this work and secured the full benefit of it in the form of compensation from the Bureau of Reclamation. The work done by respondent beyond that which would ordinarily have been required of him by the subcontract, was not a gratuity on his part. He expected full compensation for it, and a reasonable man in the position of Mr. Macri should have understood that such was respondent's expectation.

In this situation it is believed that the authorities unanimously declare that respondent is entitled to recover from the Macris the reasonable value of the extra labor and materials furnished by him, on the basis of an agreement implied in fact.

Section 72 of the Restatement of the Law of Contracts contains these words:

> "(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases and in no others:
>
> "(a) Where the offeree with reasonable opportunity to reject offered services takes the benefit of them under circumstances which would indicate to a reasonable man that they were offered with the expectation of compensation.
>
> * * * * *
>
> "(2) Where the offeree exercises dominion over things which are offered to him, such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance * * *."

In 1 Williston on Contracts, Section 36, the principle is stated in this manner:

> "Even though no request is made for the performance of work or service, if it is known that it is being rendered with the expectation of pay, the person benefited is liable."
>
> See also 1 Williston on Contracts, Sections 36 A, 91, and 91 A.

The decisions fully support the principles set forth in the Restatement and Williston on Contracts.

> *Western Asphalt Co. v. Valle,* 25 Wash. 2d 428, 171 P. 2d 159.

Roberts v. Gerlinger, 124 Or. 461, 263 P. 916.
Vaught v. Charleston National Bank, 62 Fed. 2d 817 (C.C.A. 10).
Hooper v. O. M. Corwin Co., 199 Wis. 139, 225 N.W. 822.
Collins v. Lewis, 111 Conn. 299, 149 Atl. 668.
Callan v. Andrews, 48 Fed. 2d 118 (C.C.A. 2).

Respondent acknowledges that there can be no implied-in-fact contract contrary to an express contract. It is suggested by petitioner that there can be no implied-in-fact agreement on the part of the Macris to pay respondent's costs or any part of them, for the reason that the expressed intentions of these parties are inconsistent with such an implied agreement. Petitioner now relies particularly upon Mr. Schaefer's expressed intention that he would not take over the fine grading of the excavations.

Petitioner has quoted (Petition 9) from that portion of the opinion of the District Court, in which the court said that he could not find that there was a meeting of the minds or an express contract that Mr. Schaefer was to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid the reasonable value of all his costs. The basis of this finding by the court was simply that Mr. Schaefer refused to promise to carry out the fine grading and excavating when Mr. Macri offered to turn it over to him. The court added that Mr. Schaefer continued to complain. The court concluded by saying that Mr. Schaefer's conduct was not consistent with a meeting of the minds and an express contract that Mr.

Macri was to pay Mr. Schaefer the fair value of his services.

There are two very clear reasons why this finding of the court is not inconsistent with an implied-in-fact agreement on the part of the Macris to pay respondent the reasonable value of the labor and materials furnished by him.

First, a finding that there was no express contract or meeting of the minds that respondent was to perform all or a part of the fine grading, simply means that there was no bilateral contract by the terms of which respondent promised to do that work. A finding that there was no bilateral contract and consequently no promise by respondent to do the work, is clearly not inconsistent with the existence of a unilateral contract by the terms of which an agreement may be implied in fact on the part of the Macris, to compensate respondent for the work which he actually performed. It is conceded that respondent did not expressly agree to do any fine grading, but that does not mean that if, through necessity, he was compelled to do some fine grading in order to get the job done, he should not be compensated for it on the basis of a unilateral contract implied in fact.

Second, the refusal of Mr. Schaefer to undertake the excavating and fine grading was in answer to Mr. Macri's request that Mr. Schaefer take over all the excavating and fine grading, not simply that he take over the fine grading required by reason of the defective condition of the excavations.

Cases cited by petitioner (Petition 14; Brief 38-41) in support of reason No. 1 for the allowance of the writ (Petition 13).

Petitioner contends that the cases cited by it establish the following propositions:

(a) If, following a total breach of contract, the injured party continues to perform his obligations thereunder, he thereby waives his right to rescind the contract and recover the reasonable value of benefits conferred by him upon the other party. His only remedy thereafter is an action for damages for breach of contract.

U. S. Potash Co. v. McNutt, 70 Fed. 2d 126 (C.C.A. 10).

City & County of San Francisco v. Transbay Construction Co., 134 Fed. 2d 468 (C.C.A. 9), Cert. Den. 320 U.S. 749, 88 L. Ed. 445, 64 S. Ct. 52.

Respondent contends that this principle is inapplicable in the present situation for the reason that the breach of the Macris was willful. This matter has already been covered in the argument. Furthermore, in neither of the cases cited did the injured party continue to perform in reliance upon promises of the other party to compensate him in full for such performance.

(b) The law will not imply a contract where there is an existing express contract embracing the same subject.

Wolfe v. Prairie Oil & Gas Co., 83 Fed. 2d 434 (C.C.A. 10).

Farnum v. Kennebec Water Dist., 170 Fed. 173 (C.C.A. 1).

Respondent contends, however, that the injured party, following a total breach of a contract, is entitled to recover in quantum meruit the value of his performance. This has already been demonstrated in the argument.

(c) A recovery on the common counts, following a breach of contract, is limited to the compensation stated in the contract.

U. S. Potash Co. v. McNutt, 70 Fed. 2d 126 (C.C.A. 10).
Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762.
See other cases cited (Brief 38).

The proposition stated is of no value to petitioner. Here, a contract arose by which the Macris agreed to pay respondent's costs and expenses. The proposition relied upon, therefore, has been fully met.

(d) Respondent was not entitled to rescind the subcontract and recover in quantum meruit.

See authorities cited (Brief 39, 40).

Respondent did not rescind the subcontract, nor was the decision of either court below based upon a rescission. Such decisions were based upon the fact that respondent fully performed the subcontract and supplied labor and materials in addition thereto, for which he is entitled to compensation.

(e) Paragraph 5 of the subcontract with reference to delay by the general contractor (Petition 5) furnishes the sole remedy open to respondent.

See cases cited (Brief 41).

These decisions are inapplicable for several reasons:

(i) Neither the Macris nor petitioner raised this question in their pleadings, nor was it presented to the Court of Appeals.

(ii) The Macris waived this provision by agreeing to pay respondent's costs, thereby leading respondent to believe that the Macris did not intend to rely upon this provision of the contract.

Ross Engineering Co. v. Pace, 153 Fed. 2d 35 (C.C.A. 4).

(iii) Upon the performance of the extra work by respondent, an implied-in-fact contract arose by which he was to be compensated for such work. Paragraph 5 was thereby wholly abrogated.

Cases cited by petitioner (Petition 14; Brief 38) in support of reason No. 3 for the allowance of the writ (Petition 14).

Klebe v. United States, 263 U.S. 188, 68 L. Ed. 244, 44 S. Ct. 58.
United States v. Wyckoff Pipe & Creosoting Co., 271 U.S. 263, 70 L. Ed. 938, 46 S. Ct. 503.

These cases are clearly distinguishable for reasons which have already been stated.

2.

RESPONDENT IS ENTITLED TO RECOVER FROM THE DEFENDANTS MACRI AND PETITIONER THE AMOUNT OF HIS CLAIM UNDER THE MILLER ACT

The basis for this contention is that it has already been demonstrated under the previous headings of this brief that respondent has a right to recover from the Macris either the full amount of his costs and expenses, together with overhead and profit, less what he has already received, or the amount of his extra costs and expenses, together with overhead and profit, plus the sum remaining unpaid on the subcontract.

It is established beyond doubt that if, under the law of contracts, a subcontractor has a right to a judgment against the general contractor by reason of having furnished labor or materials in the prosecution of the work provided for in the prime contract for the construction of a public work of the United States, he, the subcontractor, is entitled to a judgment likewise against the surety on the payment bond of the general contractor, by reason of the terms of the Miller Act.

In each of the following six cases, it was held that the subcontractor was entitled to a judgment against the surety under the Miller Act for the reason that, under the law of contracts, the subcontractor had a right to recover from the general contractor.

United States v. Zara Contracting Co., 146 Fed. 2d 606 (C.C.A. 2). In that case the court allowed a re-

covery against both in quantum meruit in reliance upon the general law of contracts.

United States v. John A. Johnson Contracting Corp., 139 Fed. 2d 274, Cert. Den. 321 U.S. 797 (C.C.A. 3). The court allowed a recovery based upon the general law of contracts, in reliance upon the Restatement, Williston on Contracts, and a number of decisions.

Great Lakes Construction Co. v. Republic Creosoting Co., 139 Fed. 2d 456 (C.C.A. 8). The court permitted a recovery in quantum meruit following a breach on the part of the general contractor.

Lange v. United States, 120 Fed. 2d 886 (C.C.A. 4). The court applied the law of contracts of Maryland and decided that a promise of the general contractor was supported by adequate consideration.

United States v. Standard Accident Ins. Co., 106 Fed. 2d 200 (C.C.A. 7). In that case the court allowed a recovery of a sum considerably in excess of the amount specified in the subcontract, for the reason that the subcontractor and the general contractor entered into a binding contract by which the latter agreed to pay a greater sum than that specified in the subcontract.

Royal Indemnity Co. v. Woodbury Granite Co., 101 Fed. 2d 689 (Ct. App. D.C.). The court held that the surety of the general contractor is liable whenever the general contractor himself is liable.

It has been repeatedly held that a recovery may be allowed under the Miller Act against both the general contractor and his surety, for labor or materials fur-

nished under orders or requests by the general contractor in modification of the subcontract.

Dow v. United States, 154 Fed. 2d 707 (C.C.A. 10). The subcontract provided that the banks of excavations should be vertical and that the subcontractor should perform his work as directed by the general contractor. The latter directed the subcontractor to cut the banks on a one-to-one slope, that is, on a 45-degree angle, and the subcontractor complied. The court held that the subcontractor was entitled to recover for the extra work done by him in cutting the banks on a slope.

Ross Engineering Co. v. Pace, 153 Fed. 2d 35 (C.C.A. 4). A recovery was allowed in that case for extras ordered orally by the general contractor, in spite of a provision in the subcontract that extra work should be ordered in writing.

United States v. Standard Accident Insurance Co., 106 Fed. 2d 200 (C.C.A. 7). The court enforced an express agreement to pay for extra work done by the subcontractor.

United States v. Otis Williams & Co., 30 Fed. Sup. 590 (D. Ct. Ida.). The plaintiff was permitted to recover for extra work required by changes made by the government.

United States v. Mathew Cummings Co., 27 Fed. Sup. 405 (D. Ct. Mass.). The plaintiff recovered for extra work orally ordered by the general contractor, in spite of a term in the subcontract which declared that no charges for extras would be allowed unless ordered in writing.

In conformity to the principle that if a subcontractor is entitled to a judgment against the general contractor under the law of contracts, he has a right to a judgment against the surety, it has been held that there need not be a bilateral contract between the subcontractor and the general contractor to justify a recovery against the latter and his surety, and that a unilateral contract is a sufficient basis for a recovery against both.

United States v. John A. Johnson Contracting Corp., 139 Fed. 2d 274, Cert. Den. 321 U.S. 797 (C.C.A. 3). The court said that the judgment entered in favor of the subcontractor in the trial court could be sustained on either of two grounds: (a) The subcontractor's performance of the work created a unilateral contract. (b) His performance amounted to an acceptance of the general contractor's offer, thus creating a bilateral contract.

United States v. American Surety Co., 200 U.S. 197, 50 L. Ed. 437, 26 S. Ct. 168. This case clearly establishes that it is immaterial under what sort of arrangement the labor or materials are furnished, a view which is plainly supported by the statute itself, 40 U.S.C.A., Section 270 b. The plaintiff in that case performed services for a subcontractor and not for the general contractor. The court held that the labor and materials thus furnished were within the obligation of the surety, saying:

> "The obligation is 'to make full payments to all persons supplying it (the general contractor) with labor or materials in the prosecution of the work provided for in said contract.' This language, read in the light of the statute, looks to the protection

of those who supply the labor or materials provided for in the contract, and not to the particular contract or engagement under which the labor or materials were supplied."

There may be recovery against the general contractor and his surety in quantum meruit for the reasonable value of the labor and materials furnished, where the general contractor has been guilty of a breach of contract.

United States v. Zara Contracting Co., 146 Fed. 2d 606 (C.C.A. 2).
Great Lakes Construction Co. v. Republic Creosoting Co., 139 Fed. 2d 456 (C.C.A. 8).

The measure of recovery in an action against the general contractor and his surety based upon the furnishing of labor or materials, is not simply the value of the benefit conferred upon the general contractor, but is the value of the labor or materials in the open market. If the market value is adopted as the measure of recovery, it is evident that such recovery shall include reasonable overhead and profit in addition to actual expenditures, inasmuch as any one offering to furnish labor or materials in the open market will include overhead and profit in figuring the amount of his offer.

United States v. Zara Contracting Co., 146 Fed. 2d 606 (C.C.A. 2).

The court is referred to the discussion of this principle of contract law under contention No. 1 in this brief and to the authorities there cited. The cases considered were not brought under the Miller Act, with the exception of the Zara case, but the principle is equally ap-

plicable to either sort. For reference, these authorities are cited again.

Restatement of the Law of Contracts, Section 347 (1) (a) Comment c.
5 Williston on Contracts, Section 1480.
Sofarelli Bros. v. Elgin, 129 Fed. 2d 785 (C.C.A. 4).
Schwasnick v. Blandin, 65 Fed. 2d 354 (C.C.A. 2).
Nelson v. City of Seattle, 180 Wash. 1, 38 P. 2d 1034.

Petitioner has stated in its brief, page 26, that respondent "is seeking to recover damages for breach of the subcontract on the part of Macri." We believe that it has been clearly demonstrated in the statement of the case that such is not the fact. The opinion of the Court of Appeals establishes that both courts regarded the judgment as based on the reasonable value of the labor and materials furnished by the respondent plus overhead and profit, and not upon damages for breach of contract (173 Fed. 2d 5, 8). Not a single item of damages which is normally awarded to the injured party in an action for damages for breach of contract, was allowed in this judgment. Respondent did not seek nor was he awarded damages for loss of profits. What he was allowed was reasonable overhead and profit to bring his actual costs into conformity to the amount petitioner would have been compelled to pay in the open market for the labor and materials furnished by respondent.

Petitioner has made an extremely serious error in reasoning in its argument with respect to its liability as surety on this bond, in its contention No. 1, pages 27 to 33 of the brief.

The language of the Miller Act is quoted on page 24. It is said that this statute requires a payment bond with a surety or sureties,

> "for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract."

The principal provision of the bond is also quoted on page 25, the material terms of which are as follows:

> "If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, * * * then this obligation to be void; otherwise, to remain in full force and virtue."

It is then stated repeatedly that inasmuch as all of the extra labor and materials furnished by respondent were outside the scope of the subcontract entered into between the Macris and respondent, the claim of respondent to the reasonable value of such extra labor and materials is outside the scope of the statute and bond, and therefore there is no liability on the part of the surety to compensate respondent for such extra labor and materials.

The error in reasoning is quite apparent. The statute and the bond clearly mean that if anyone furnishes to a general contractor labor and material which have the effect of prosecuting the work provided for in the prime contract between the general contractor and the government, the one furnishing such labor and material is entitled to compensation from the surety if the general contractor fails to pay him. The mere fact that the

furnishing of certain labor and materials may be outside the scope of a subcontract entered into between the general contractor and the subcontractor, does not mean that the subcontractor is not entitled to compensation under the statute and bond from the general contractor and the surety. The statute and bond are clearly satisfied if the labor and materials furnished by the subcontractor are such as to constitute "prosecution of the work provided for in said contract," namely, the contract between the general contractor and the government. The word "contract," as used in the statute and bond refers to the prime contract between the general contractor and the government and not to a subcontract between the general contractor and another.

If petitioner's contention is sound, a subcontractor who furnishes extra labor and materials beyond those called for by the subcontract, is not entitled to compensation under the statute and bond under any circumstances whatever.

The decisions already cited in this brief under this contention No. 2 clearly establish that this position is wholly untenable. Five decisions have been cited herein in support of the proposition that a recovery may be allowed under the Miller Act against both the general contractor and his surety, for labor and materials furnished under orders or requests by the general contractor in modification of the subcontract. In three of these cases, *Dow v. United States,* supra, *Ross Engineering Co. v. Pace,* supra, and *United States v. Mathew Cummings Co.,* supra, it was held that the plaintiff, a sub-

contractor, was entitled to recover from the general contractor and the surety the reasonable value of labor and materials furnished by the plaintiff pursuant to an oral request made by the general contractor. In *United States v. Standard Accident Insurance Co.*, supra, the court enforced an express agreement to pay for extra work done by the subcontractor. In *United States v. Otis Williams & Co.*, supra, the plaintiff was permitted to recover for extra work required by changes made by the government. It has also been established, as heretofore stated, that there need not be a bilateral contract between the subcontractor and the general contractor to justify a recovery against the latter and his surety. In *United States v. John A. Johnson Contracting Corp.*, supra, the court expressly held that a unilateral contract is a sufficient basis for a recovery against both.

We respectfully contend, therefore, that a subcontractor who furnishes extra labor and materials in response to the oral request of the general contractor and the oral promise by him to pay for such extra labor and materials, is entitled to recover the reasonable value thereof from the general contractor and his surety.

There are only two tests that need be met, therefore, by a plaintiff in an action under the Miller Act: (1) Has the plaintiff furnished labor and materials to the general contractor of such a character that they constitute prosecution of the work provided for in the contract between the general contractor and the United States government? (2) Has the plaintiff furnished labor and materials to the general contractor under such circumstances that the latter is liable to the plaintiff for the

reasonable value of such labor and materials by reason of the law of contracts?

Respondent respectfully contends that both of these tests have been fully met in the present case. The mere fact that most of the recovery sought by respondent was for labor and materials outside the original scope of the subcontract, has no bearing whatever upon respondent's rights against the petitioner; the labor and materials furnished by respondent clearly were within the prosecution of the work provided for in the prime contract between the Macris and the government, and that is all that is required. The Supreme Court itself, in *United States v. American Surety Co.*, supra, declared that the language we are considering in the statute

> "looks to the protection of those who supply the labor or materials provide for in the contract, and not to the particular contract or engagement under which the labor or materials were supplied."

If a general contractor should agree to pay a subcontractor a grossly excessive amount for a certain portion of the work, the surety would most certainly contend that its liability extended no farther than the reasonable value of the labor and materials furnished by the subcontractor plus overhead and profit. If that is true, then in the reverse situation, which exists in the present case, the surety should also be liable for the reasonable value of labor and materials furnished plus overhead and profit.

Cases cited by petitioner (Petition 13, 14; Brief 34) in support of reason No. 1 for the allowance of the writ (Petition 13).

It is respectfully submitted that not one of the cases cited by petitioner is contrary to the decision of the Court of Appeals in the present case.

L. P. Friestedt Co. v. U. S. Fireproofing Co., 125 Fed. 2d 1010 (C.C.A. 10). The plaintiff and an intervenor contended that they were entitled to recover against the surety under the Miller Act by reason of the fact that the performance of their subcontracts was made more expensive than it normally would have been, by reason of the undue delay of the general contractor. The court affirmed a judgment which denied both claims. This case is readily distinguishable from the present case on several grounds: (a) Neither of these claimants contended that it furnished anything extra which was necessary for the completion of the contract. (b) There was no contract or agreement of any kind between these claimants and the general contractor by which the latter undertook to compensate either of the claimants for any costs or expenses beyond those which normally would have been incurred in the performance of such subcontracts. (c) The only contention of the claimants was that their performance was made more expensive by the delay of the general contractor. In the present case, mere delay was of minor importance. (d) Actually, both claimants sought to recover damages for breach of contract. In that connection, the court said:

> "Stripped of all technicality, plaintiff and intervenor seek to recover damages claimed to have been incurred because of the breach by the contractor of an implied covenant in the sub-contract against unreasonable delays preventing the sub-contractors from proceeding with their work."

In the present case, the Court of Appeals, after quoting from the opinion in the Friestedt case, made this statement:

> "Here the new agreement between the Macris and Schaefer contemplated that Schaefer was to perform extra work, which the Macris were originally obliged to perform, in order that the main contract between the Macris and the United States could be performed. The performance of the new agreement furnished labor and materials agreed by the Macris to be supplied under the main contract and hence labor and materials within the terms of the Miller Act and the bond."

Petitioner stresses the statement of the court in the Friestedt case that "the claim for which the parties seek recovery here did not arise under the contract, but outside of the contract." There was no agreement outside of the original subcontract by which these claimants were to receive any compensation whatever; that is, the claimants did not establish that they were entitled to a judgment against the general contractor as a matter of contract law. In the present case, it has been fully demonstrated that respondent is entitled to recover from the general contractor as a matter of contract law.

United States v. Maryland Casualty Co., 54 Fed. Sup. 290 (D. Ct. La.), affirmed 147 Fed. 2d 423 (C.C.A. 5). The plaintiff here sought to recover the rental or use

value of certain equipment which was kept idle due to an order of the government engineer suspending work on the project. Here, likewise, there was no agreement of any kind by which the general contractor undertook to pay any compensation to the plaintiff for any costs or expenses in addition to the cost of performance under normal conditions. Furthermore, it is clear that the plaintiff sought simply damages for breach of contract as distinguished from the reasonable value of labor or materials actually furnished to the project. If the equipment was kept idle, it is clear that it contributed nothing to the prosecution of the work. In this connection, the court said:

> "Nothing was owing for work, labor or equipment and nothing was owing for material in the prosecution of the work; no modifications of the contract had been made or were contemplated. All that transpired was that, without fault of the subcontractor, the Government engineer ordered the work stopped and declined to permit removal of equipment. This was a breach of the contract, and it may be that appellant is entitled to recover for this breach as against the prime contractor or the Government, or both, but it becomes patent that we are not warranted in fastening upon the Casualty Company liability on its bond for this breach."

United States v. Seaboard Surety Co., 26 Fed. Sup. 681 (D. Ct. Mont.), affirmed 106 Fed. 2d 355 (C.C.A. 9). The plaintiff, a subcontractor, sought by this action to recover profits lost by it due to the delay of the general contractor. The latter was compelled to discontinue work because of insolvency. The plaintiff then refused to perform further and his surety completed the work.

The court held that the plaintiff was not entitled to recover damages for loss of profits.

This case has no application to the present situation for the reason that respondent is not attempting to recover damages for loss of profits which he might have earned under other circumstances than those which actually existed. Respondent is attempting to recover an item of profit in order that his total recovery may amount to the market value of the labor and materials furnishd by him.

This case is distinguishable for the further reasons that the plaintiff did not claim compensation for extra labor or materials furnished by him, and alleged no contract of any sort to pay him for any extra labor and materials.

United States v. John A. Johnson & Sons, 65 Fed. Sup. 514 (D. Ct. Md.). Here a subcontractor sought to recover increased costs due to the failure of the general contractor to construct certain temporary roads necessary to the proper performance of the subcontractor's work. The court denied a recovery on this claim in reliance upon the Friestedt, Maryland Casualty Co., and Seaboard Surety Co. cases which have just been considered herein. This case may be distinguished from the decision of the Court of Appeals in the present case on the same grounds as the other cases already considered: The subcontractor was seeking to recover damages for breach of contract. There was no agreement, in writing or otherwise, by which the general contractor undertook to compensate the subcontractor for any costs

in addition to those normally to be expected. Although an appeal was taken in this case, such appeal did not include the claim just discussed. Consequently, the Circuit Court of Appeals did not pass upon the question whether that claim was within the terms of the statute and bond.

United States v. Massachusetts Bonding and Insurance Co., 18 Fed. 2d 203 (C.C.A. 6). The plaintiff brought that action under the Miller Act for damages for the alleged wrongful death of her husband. The court held that the plaintiff's claim was not within the terms of the statute and bond.

American Surety Co. v. Wheeling, 114 Fed. 2d 237 (C.C.A. 4). That action was not brought on a bond given under the Miller Act, and has no application here.

Decisions of this court which have settled questions of federal law involved in the present case (Petition 14).

McEvoy v. United States, 322 U.S. 102, 88 L. Ed. 1163, 64 S. Ct. 890.
United States v. American Surety Co., 200 U.S. 197, 50 L. Ed. 437, 26 S. Ct. 168.

These cases establish that there may be a recovery under the Miller Act on an implied as well as an express contract and, in fact, that the character of the arrangement between the subcontractor and the general contractor is unimportant.

Cases cited by petitioner (Petition 14; Brief 34) in support of reason No. 3 for the allowance of the writ (Petition 14).

McEvoy v. United States, 322 U.S. 102, 88 L. Ed. 1163, 64 S. Ct. 890. The plaintiff in that case furnished labor and materials to one who did not fall in the classification of the general contractor or a subcontractor. The Supreme Court held that he was not entitled to recover from the surety in this action under the Miller Act for the reason that he did not fall within the classification of persons who may bring an action against the surety on a bond given under that act. The statute authorizes an action against the surety on such a bond only by those material men, laborers, and subcontractors who deal directly with the prime contractor, and by those who have a contractual relationship with a subcontractor and who gives statutory notice to the prime contractor. The plaintiff simply did not fall within either classification. This decision has no application whatever to the present case.

3.

RESPONDENT IS ENTITLED TO RECOVER ALL ITEMS ALLOWED BY THE DISTRICT COURT

The allowance of all items other than "overhead" and "profit" is fully supported by these decisions:

Brogan v. National Surety Co., 246 U.S. 257, 62 L. Ed. 703, 38 S. Ct. 250.

United States v. Zara Contracting Co., 146 Fed. 2d 606 (C.C.A. 2).

Glassell-Taylor Co. v. Magnolia Petroleum Co., 153 Fed. 2d 527 (C.C.A. 5).
United States v. Seaboard Surety Co., 26 Fed. Sup. 681 (D. Ct. Mont.), affirmed 106 Fed. 2d 355 (C.C.A. 9).
United States v. Ambursen Dam Co., 3 Fed. Sup. 548 (D. Ct. Cal.).

A few comments with respect to the items appearing in Exhibit 63 may be of some value. "Labor (R. 1252)," "Batching (R. 1256, 1297, 1328)," "Payroll insurance (R. 1253)," "Payroll taxes (R. 1254)," are all allowable as labor. Batching represents the mixing of aggregate by another company. The items of payroll insurance and taxes are allowable on the principle of necessity, as labor cannot be employed without making such payments. "Truck hire (R. 1254, 1296)," and "Equipment rental (R. 1254)," are allowable as they represent sums paid for the rental of equipment belonging to others. "Small tools (R. 1254)," and "Hardware (R. 1255)," are proper as expendable items. "Equipment repair and maintenance (R. 1254, 1298)," are allowable as minor repairs made necessary by the use of machinery. "Gasoline (R. 1255)," and "Oil (R. 1255)," are allowable as expendable supplies. "Form oil," "Metal pipe plugs" which were made especially for use on this job, "Hunt Process and Sealcure (R. 1255)," "Sisalkraft Paper," "Lumber for cement shed," and "Roofing for cement shed (R. 1256)," are proper as materials used in the prosecution of the work, the first four of these items being used in the actual construction of the concrete structures, and the last two being incorporated in a cement shed used by the respondent. The remaining items

should be included as necessary expenses.

Overhead and profit have been considered in the argument of contention No. 1 in this brief. Both items are a part of "labor and material" as surely as if they represented actual work and actual materials.

The measure of recovery in an action against the general contractor and his surety based upon the furnishing of labor and materials, is not simply the value of the benefit conferred upon the general contractor, but is the value of the labor and materials in the open market. If the market value is adopted as the measure of recovery, it is evident that such recovery should include reasonable overhead and profit in addition to actual expenditures, inasmuch as anyone offering to furnish labor or materials in the open market will include overhead and profit in figuring the amount of his offer.

> *United States v. Zara Contracting Co.*, 146 Fed. 2d 606 (C.C.A. 2).

The court is referred to the discussion of this principle of contract law under contention No. 1 in this brief, and to the authorities cited there. The cases considered were not brought under the Miller Act, with the exception of the Zara case, but the principle is equally applicable to either sort. For reference, these authorities are cited again.

> Restatement of the Law of Contracts, Section 347 (1) (a) Comment c.
> 5 Williston on Contracts, Section 1480.
> *Sofarelli Bros. v. Elgin*, 129 Fed. 2d 785 (C.C.A. 4).

Schwasnick v. Blandin, 65 Fed. 2d 354 (C.C.A. 2).
Nelson v. City of Seattle, 180 Wash. 1, 38 P. 2d 1034.

Cases cited by petitioner (Brief 35) in support of reason No. 1 for the allowance of the writ (Petition 13).

Only three of the cases cited by petitioner have any bearing whatever upon the right of the respondent to recover overhead and profit. All of the cases cited will be considered briefly.

United States v. Davidson, 71 Fed. Sup. 401 (D. Ct. Ida.). In entering judgment for the subcontractor, the court disallowed items of overhead and profit, without any discussion of the question and without citing any authorities. The court did not indicate whether the items were disallowed because of a failure of proof or because they were not within the scope of the statute and bond.

United States v. Great American Indemnity Co., 30 Fed. Sup. 613 (D. Ct. N.H.). Here also the trial court in entering judgment for the plaintiff, a subcontractor, declined to include an award for profit. The court discussed the question and cited three cases, two of which have no bearing on the question. The third is the Theobald-Jansen case discussed below, which is certainly no authority for the position taken by petitioner.

Theobald-Jansen Electric Co. v. P. H. Meyer Co., 77 Fed. 2d 27 (C.C.A. 10). Here the general contractor entered into an agreement with another company, the

intervenor, by which the latter agreed to assume the obligations of the general contractor on a certain construction project, in return for half of the profit to be derived from it. The intervenor, after the work was completed, intervened in this action against the surety of the general contractor to recover the compensation which the latter had agreed to pay, namely, half of the profit to be derived from the project. The court denied a recovery, declaring that inasmuch as the general contractor could not sue his own surety, neither could the intervenor.

It is obvious that this decision is not an authority for the proposition that a subcontractor is not entitled to recover profit as an item making up the market value of his performance.

United States v. Standard Casualty Co., 32 Fed. Sup. 836 (D. Ct. N.Y.). The court indicated that insurance premiums on workmen's compensation and employers' liability policies are not "labor and materials." The issue before the court is not made clear, however, as it appears that the plaintiff was a casualty insurance company.

United States v. Rego Building Corp., 87 Fed. 2d 1021 (C.C.A. 2). In that case the court simply affirmed the judgment of the District Court without opinion.

Continental Casualty Co. v. Clarence L. Boyd Co., 140 Fed. 2d 115 (C.C.A. 10). Nowhere in the opinion in that case is the matter of overhead and profit discussed.

4.

THE LAW GOVERNING THE SEVERAL ISSUES

Respondent has no objection to this statement in the opinion of the Court of Appeals with respect to the law governing the several issues (173 Fed. 2d 5, 7, 8):

> "On the issue of the Macris' liability to Schaefer, we think that the Washington law should govern.
>
> * * * *
>
> "On the issue of Continental's liability on the payment bond, the federal law should control because the determination of the extent of the liability involves the construction of a federal statute, the Miller Act, under which it was created, * * *."

5.

THE EVIDENCE ESTABLISHES WITH REASONABLE CERTAINTY THE AMOUNT WHICH RESPONDENT IS ENTITLED TO RECOVER

The decision of the Court of Appeals with respect to the amount of recovery is found in these words (173 Fed. 2d 5, 9):

> "Schaefer introduced a statement of costs prepared by a certified public accountant which showed all Schaefer's costs on this project. From this amount was subtracted the amount the Macris had paid on account and judgment was rendered for the difference. There was evidence to show what Schaefer's costs would have been if the work had progressed as originally contemplated, and this amount was substantially the same as the amount of Schaefer's bid, so the increased costs of Schaefer were properly

> computed by reference to this statement. In the light of this evidence we cannot say that the finding of the trial court was erroneous. The judgment in favor of Schaefer against the Macris is affirmed."

The statement of costs referred to by the court in that quotation is Exhibit 63, the audit prepared by a certified public accountant at respondent's request (R. 1241, 1243, 1251, 1252).

It has already been shown in the argument under contention No. 1 in this brief that respondent should be allowed to recover on three separate theories. These will now be considered separately to demonstrate that the amount of the judgment can be sustained on each.

A.

Recovery in quantum meruit of all respondent's costs and expenses, together with overhead and profit, based upon the Macris' willful and continuing breaches of the subcontract.

The District Court found that the value of the labor and materials furnished and services rendered for which the Macris were chargeable, was as shown in Exhibit 63; and the court allowed all the items set forth therein with the exception of interest and two minor items (R. 103, 104). Petitioner has not attacked the accuracy of this audit, nor has it contended that it does not truly show respondent's actual costs and expenses. Petitioner does contend that respondent should not be permitted to recover overhead and profit, but that contention has already been answered.

There is substantial evidence establishing the items of overhead and profit. The accountant who prepared Exhibit 63 testified that he fixed overhead at 20% of the total direct costs because the true percentage, which he ordinarily used, was too high for a business of this kind (R. 1239, 1251, 1259, 1269). This was undoubtedly due to respondent's most unfortunate experience on this project. The accountant then stated that he computed the profit at 10% of the total of the direct costs and overhead, as most cost-plus jobs in the construction field are figured on that basis. He added that it had been respondent's practice to bill on that basis, and to include overhead in his cost (R. 1272, 1273).

It cannot be seriously contended, therefore, that respondent has not met the burden of proof with respect to the measure of his recovery on the theory set forth under this subdivision A.

It is respectfully submitted, therefore, that respondent's recovery should be computed as follows, if this theory is adopted:

(a) Respondent's total direct costs allowed by the court	$67,712.84
(b) Overhead—20% of (a)	13,542.57
(c) Respondent's total costs—(a) plus (b)	81,255.41
(d) Ten per cent profit	8,125.54
(e) Total costs, overhead and profit—(c) plus (d)	89,380.95
(f) Amount paid by the Macris	32,614.66
(g) Total amount due and unpaid—(e) minus (f)	$56,766.29

This figure varies slightly from the amount of the judgment due to an error in calculation at the conclusion of the trial.

B.

Recovery based on the principle that an injustice can be avoided only by enforcement of the Macris' promises to pay respondent's costs, and the Macris are estopped to assert that their promises are not binding upon them.

As previously pointed out, it is not entirely clear whether Mr. Macri promised Mr. Schaefer to pay all of respondent's costs, or only his extra costs due to the Macris' breaches of the subcontract. The District Court allowed all of respondent's costs and expenses together with overhead and profit, less what he received. In affirming the amount of the recovery, the Court of Appeals said (173 Fed. 2d 5, 9):

> "* * * the increased costs of Schaefer were properly computed by reference to this statement (Exhibit 63)."

If, under the theory set forth under this subdivision B, respondent is entitled to recover all of his costs and expenses together with overhead and profit, less what he has received, it is clear that the judgment should be affirmed, for the reasons stated in subdivision A.

If, on the other hand, respondent is entitled to a judgment for the amount specified in the subcontract, less what he received, and in addition thereto his extra costs and expenses, there is ample testimony in this

record to support the judgment. The following discussion deals only with the latter recovery, i.e., for the additional costs and expenses, and the corresponding overhead and profit.

Petitioner contends that the respondent failed to keep a separate account of his increased costs and that he failed to introduce any evidence of their extent at the trial. It is further contended that the respondent, not having met the burden of proof, is entitled to recover nothing inasmuch as the evidence shows the Macris have already paid respondent almost all he would have been entitled to receive if the subcontract had been faithfully performed by the Macris.

There are two answers to these contentions, although it is conceded that respondent did not keep a separate account of his extra costs.

In the first place, the breach of contract by the Macris was willful and negligent and was of such character as to render precise computations of extra costs economically and in most situations physically impossible.

The extra work done by respondent consisted in the following:

Fine grading the excavations to the proper level; removing earth from the walls of the excavations to give them more slope and permit the forms to be inserted properly; removing earth or cribbing and back-filling, where the walls were not properly excavated to the neat concrete line; removing from excavations, panels as-

sembled into structures, when it appeared that the excavations had not been dug to the proper grade, and reassembling such panels in the excavations after additional fine grading; removing the forms under adverse conditions after the concrete had set; taking the forms back to the yard in order that they might be rebuilt, and returning them to the next excavation; rebuilding panels to a different size because of a lack of lumber and the vertical walls of the excavations; additional use of trucks; additional use of other equipment; additional supervision, that is, a superintendent and foreman were required for a much longer period than would have been necessary under normal conditions.

It is evident that from the nature of the operation and the extra work done, it would have been economically, and in most instances physically impossible to have kept an exact account of all these extra costs. Mr. Schaefer testified that with respect to part of such extra operations it was a physical impossibility to establish a dividing line between what was work required by the subcontract and what was additional work (R. 1368).

In the second place, respondent did produce very substantial evidence of additional costs, and it is respectfully submitted that such evidence fully meets the requirements established by the Supreme Court which will be discussed.

This evidence consisted in the testimony of several witnesses and Exhibits 51 (R. 572, 578, 586) and 63 (R.

1241, 1243, 1251, 1252). Exhibit 51 shows the estimated time of performance of all aspects of his work: constructing forms, pouring concrete, and stripping the forms. It also shows the daily progress of the work by means of cumulative percentages of the total to be done in each of these three categories. It also indicates exactly how many men were employed each day and in what work they were primarily engaged. Exhibit 63 is the audit prepared by the certified public accountant at respondent's request, setting forth all of his costs and expenses itemized by months.

Mr. L. E. Bufton, an engineer of uncommon experience in the field of concrete construction (R. 1133 to 1139), testified that after examining the specifications covering this job, the work required of respondent under the subcontract could have been performed by him, if the Macris had performed their obligations under the subcontract, in not more than four months (R. 1160, 1161, 1162). He added that to accomplish this in four months, he would need an average of 25 men per day (R. 1216), which means, assuming 25 working days in each month, 2,500 man days would have been required.

By means of a hypothetical question setting forth the details of the conditions under which respondent was compelled to do his work, Mr. Bufton was asked how and to what extent the conditions mentioned would affect the reasonable cost and value of the performance by respondent (R. 1167, 1168, 1169). His answer was that he could not state the additional costs in dollars

and cents but that he felt that the cost might be from two to three times as much as it should have been under normal conditions (R. 1172 to 1175).

Finally, Mr. Bufton said that he figured the reasonable cost and value of the performance of the work undertaken by respondent, assuming that the Macris performed their obligations as required by the subcontract, would be $27.88 per cubic yard. He added that this figure included an allowance for the services of the subcontractor himself and overhead. By overhead he said he meant home office and general supervision (R. 1162, 1163, 1164). Mr. Bufton also referred to a similar project in Oregon. He said the subcontractor carrying out the concrete work in that instance had bid $30.00 per cubic yard with the understanding that he would furnish all the lumber for forms (R. 1141, 1142, 1143). Respondent here testified that his bid of $26.00 per cubic yard would have been raised to $30.00 if he had been required to furnish the lumber (R. 419). Thus their bids were in the same amount.

Mr. Darcy, respondent's superintendent, testified that if the excavations had been ready with the banks on a one-to-one slope and a lateral clearance of one foot at the foundation of the structure, and lumber had been furnished of proper quality and on time, no more than three and a half months at the very outside would have been necessary to complete the job (R. 464). Actually a year and three weeks were required.

Exhibit 51 clearly indicates that this job could have

been completed within three and a half months or at least within the four months specified by Mr. Bufton, if the Macris had faithfully performed the subcontract. That exhibit shows the following actual performance by respondent during the periods indicated:

> Form setting, from Feb. 9, 1945, to Mar. 8, 1945, the most productive month—17½ per cent of the entire job.
>
> Pouring concrete, from Mar. 1, 1945, to Mar. 30, 1945, the final 30 days—30 per cent of the entire job.
>
> Stripping forms, from Mar. 5, 1945, to Apr. 4, 1945, the final month—39 per cent of the entire job.

These figures demonstrate that so far as pouring concrete and then stripping the forms were concerned, operations in which respondent was not directly dependent on the Macris, respondent could have performed all of the work contemplated by the subcontract in 100 days of elapsed time. During no month was he able to construct in the excavations more than 17½ per cent of the entire number of forms required on this project, but it appears from Exhibit 51 that in seven days of actual time and eight days of elapsed time, from January 19, 1945, to January 26, 1945, respondent's men were able to set 6½ per cent of the entire number of forms, and that on each of sixteen other days, widely scattered, they set one per cent or more of the total number. It was in the setting of the forms in the excavations that the breaches of the Macris created the most serious obstacle to respondent.

Exhibit 51 establishes by means of the following computation that respondent actually demonstrated the capacity to complete the work in the same or less time and with less men than Mr. Bufton estimated:

Form setting (including yard, form setting, field repair, and trucking crews)—6½% of the work required 107 man-days.

Concrete pouring—30% of the work required 176 man-days.

Form stripping—30% of the work required 34 man-days.

All types of work—100% would require 2,346 man-days.

One other fact is worthy of mention: The ratio of respondent's demonstrated performance of 2,346 man-days to Mr. Bufton's estimated performance of 2,500, is 94/100. The ratio of respondent's bid per cubic yard of $26.00 to Mr. Bufton's estimate of $27.88, is 93/100. The significance of this fact is that it establishes that respondent's bid may properly be used as a basis for a computation of the amount for which the work could have been done.

Respondent's extra costs may be determined with reasonable certainty from the testimony and exhibits just considered, by two separate computations:

1. Based on the difference between respondent's actual, total costs and his estimated costs.

(a) Respondent's bid, per cubic yard.....$ 26.00

(b) Respondent's estimated costs, elimi-

nating 10% profit but not overhead—10/11 of (a)	23.64
(c) Number of yards poured for which compensation was paid to the Macris—Exhibit 14 (R. 160)	1,356.697
(d) Respondent's estimated costs, including overhead but not profit—(b) multiplied by (c)	32,072.32
(e) Respondent's total, actual costs including 20% overhead — (c) of table in subdivision A	81,255.41
(f) Respondent's extra costs including 20% overhead—(e) minus (d)	49,183.09
(g) Ten per cent profit	4,918.31
(h) Total extra costs and profit—(f) plus (g)	$54,101.40

To this should be added, of course, the amount which remains unpaid under the subcontract.

(i) Amount required by the subcontract to be paid—(a) multiplied by (c)	$35,274.12
(j) Amount paid by the Macris	32,614.66
(k) Balance remaining unpaid—(i) minus (j)	2,659.46
(l) Total amount due and unpaid on this basis—(h) plus (k)	$56,760.86

It will be observed that this is $4.11 less than the amount of the judgment.

2. Based on Mr. Bufton's estimate that the total cost might be from two to three times as much as it should have been under normal conditions.

A figure of two and one-half was adopted in making this computation, which means that the extra costs are assumed to be one and one-half times the costs under normal conditions.

(a) Respondent's estimated costs, including 20% overhead but not profit—(d) of previous table in subdivision B	32,072.32
(b) Total costs based on Mr. Bufton's estimate of rate increase, but respondent's estimate of costs, including 20% overhead—(a) multiplied by 1½	48,108.48
(c) Ten per cent profit	4,810.85
(d) Total extra costs and profit—(b) plus (c)	52,919.33
(e) Balance remaining unpaid on subcontract—(k) of previous table in Subdivision B	2,659.46
(f) Total amount due and unpaid on this basis—(d) plus (e)	$55,578.79

This is $1,186.18 less than the amount of the judgment, but it would be substantially increased by using Mr. Bufton's estimated cost of $27.88 per cubic yard, or adopting his estimated increase of three times the cost under normal conditions.

It is respectfully submitted that the evidence, as

thus analyzed, fulfills the requirements of the Supreme Court with respect to the character of proof required to sustain a money judgment.

Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680, 90 L. Ed. 1515, 66 S. Ct. 1187, was an action for overtime compensation under the Fair Labor Standards Act. The Circuit Court of Appeals reversed a judgment entered in favor of the plaintiff in the District Court, for the reason that the evidence of the extent of his overtime work was conjectural. The Supreme Court reversed the Circuit Court of Appeals and affirmed the judgment of the District Court, saying:

> "* * * here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such case, 'it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts.' * * * It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages."

Bigelow v. RKO Radio Pictures, Inc., 327 U. S. 251, 90 L. Ed. 652, 66 S. Ct. 574, was an action under the Sherman and Clayton Acts for an injunction and to recover treble damages. The Supreme Court affirmed the judgment for the plaintiffs entered in the District Court, although the evidence of damages sustained by the plaintiffs consisted simply in a comparison of the plaintiff's receipts before and after the defend-

ant's wrongful acts. In reversing the Circuit Court of Appeals for the Sixth Circuit, the court said:

> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act on probable and inferential as well as upon direct and positive proof.' "

C.

Recovery based on the implied-in-fact agreement of the Macris to pay respondent's costs.

It is probable that the implied-in-fact agreement is limited to an undertaking by the Macris to pay all of respondent's additional costs and expenses. Inasmuch as his claim was unliquidated, he has a right to recover in quantum meruit or by specific performance of the agreement. In either event his recovery is the same, and the evidence amply justifies the affirmance of the judgment, as was pointed out fully in the discussion under subdivision B.

Cases cited by petitioner (Petition 14; Brief 42) in support of reasons No. 1 and 3 for the allowance of the writ (Petition 13, 14).

United States v. Wyckoff Pipe & Creosoting Co., 271 U.S. 263, 70 L. Ed. 938, 46 S. Ct. 503.
See also cases cited (Brief 42).

In these cases, the evidence relating to the extent of recovery was purely speculative and conjectural. It has already been demonstrated beyond doubt that in the present case the amount which the respondent is entitled to recover has been established with reasonable certainty.

Respectfully submitted,

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